SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 478

EMMETT HORTON, *Petitioner,*

vs.

LIBERTY MUTUAL INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1 IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

LIBERTY MUTUAL INSURANCE COMPANY, *Plaintiff*,

versus

EMMETT HORTON, *Defendant*.

Plaintiff's Original Complaint—Filed Apr. 30, 1959

To the Honorable Judge of said Court:

Comes Now Liberty Mutual Insurance Company, plaintiff in the above entitled and numbered cause, and files this action against Emmett Horton, a resident of Texas, and for cause of action would respectfully show unto the Court the following:

2 1.

Plaintiff Liberty Mutual Insurance Company is a private corporation duly incorporated under and by virtue of the laws of the State of Massachusetts and is domiciled and has its place of residence and principal place of business in said state and its home office and principal place of business is in Boston, Massachusetts and it has a valid and subsisting permit to do business in Texas and at all times material hereto, plaintiff was duly authorized to conduct the business of writing insurance in the State of Texas. The defendant Emmett Horton is a resident citizen of Newton County, Texas, and can be served with process at Newton, Texas, Route 2, Box 162.

2.

Plaintiff, Liberty Mutual Insurance Company complains of said defendant and says that the defendant has claimed and now claims and alleges that on or about October 8, 1957, that the defendant sustained an accidental injury in the course of and scope of his employment for American Bridge Division, United States Steel Corporation in Orange, Orange County, Texas, resulting in total and permanent disability, and defendant further claimed that he at that time, was earning in excess of Ninety Dollars ($90) per week and that his wage rate would entitle him to workmen's compensation benefits and payments at the rate of Thirty-five Dollars ($35) per week for Four Hundred

One weeks (401), and that as a result of said alleged accidental injury resulting in such alleged disability that defendant claims and will claim the sum of Fourteen Thousand Thirty-five Dollars ($14,035.00) which sum is in excess of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

3.

That heretofore to-wit, on the 30th day of April, 1959 the Industrial Accident Board of the State of Texas, made and entered its final ruling, order and award in favor of said defendant and against this plaintiff in the matter of that certain claim of the defendant against this plaintiff which was numbered before said Board S-46626 and was styled Emmett Horton vs. American Bridge Division, United States Steel Corporation, Employer and Liberty Mutual Insurance Company, Insurer, on the docket of said Board; that by the terms of said ruling, order and award, it was ordered and decreed that on October 8, 1957 that the employer above named was a subscriber to the Employer's Liability Act of Texas, and that such workmen's compensation or employer's insurance was carried by Liberty Mutual Insurance Company; that on such date the employer had within its employ more than three (3) employees, including Emmett Horton, whose average weekly wage produced a compensation rate of Thirty-five Dollars ($35) per week under said Act, that on October 8, 1957, said Emmett Horton suffered accidental injuries in the course and scope of his employment resulting in disability and in payment accrued in the amount of Thirty (30) weeks at the rate of Thirty-Five Dollars ($35) per week or the sum of One Thousand Fifty Dollars ($1050), that within twenty (20) days after the rendition and entry of said final ruling, order and award of the Industrial Accident Board of the State of Texas, plaintiff herein, being an interested party in and to the award, gave to and filed with the Industrial Accident Board of the State of Texas, notice in writing that it, the Liberty Mutual Insurance Company, plaintiff herein was dissatisfied with and would not abide by the award so made, and further, said notice was so served and filed, and stated that plaintiff herein would file a suit in a Court of competent jurisdiction

within the proper and legal time for the purpose of setting aside and vacating said award, and now this plaintiff within 20 days from the filing with the said Industrial Accident Board of the State of Texas, with said notice, files this its suit in this Court to set aside said award, said original notice of dissatisfaction having been filed on or about April 30, 1959.

4.

The amount in controversy as claimed by defendant and which defendant claimed and claims before the Industrial Accident Board is in excess of the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs, said defendant before the Industrial Accident Board claiming to have been totally and permanently injured in said above described accident in the course and scope of his employment, which if true, would be a sum equal to Fourteen Thousand Thirty-five Dollars ($14,035.00).

5.

As shown in the preceding paragraph the amount in controversy was and is in excess of Ten Thousand Dollars ($10,000) exclusive of interest and costs, said injury is alleged to have occurred in Orange County, Texas, which is within the district of the United States District Court, in and for the Eastern District of Texas, and is within the Beaumont Division thereof, and due to the complete diversity of all the adverse parties in interest, this Court has jurisdiction and venue to entertain this suit and vacate and set aside the said award and order of the Industrial Accident Board of the State of Texas.

6.

Plaintiff would further show that said order, and award of the Industrial Accident Board of the State of Texas, above described, made and entered on April 30, 1959, in this claim and the claim itself of the defendant herein is wholly unsupported by evidence or law and should be in all things, vacated, set aside and held for naught.

7.

Plaintiff would further show unto the Court that the said award and order of the Industrial Accident Board of the State of Texas, above described, made, rendered and entered on April 30, 1959 and the claim of the defendant of total and permanent disability is wholly without evidence to support it in law for the reason that, and this plaintiff alleges that any disability which the defendant has is due solely and alone to other diseases, conditions and injuries, or a combination thereof, and in nowise contributed to or caused by the alleged injury in
6 the course and scope of his employment for American Bridge Division, United States Steel Corporation.

8.

That the plaintiff herein Liberty Mutual Insurance Company, was and is the workmen's compensation insurance carrier for United States Steel Corporation, American Bridge Division on the date of the accident claimed by the defendant, to-wit October 8, 1957.

Wherefore, premises considered, plaintiff prays that defendant be cited to appear and answer this complaint and that upon final hearing hereof said award be in all things vacated, set aside, voided and declared to be of no further force and effect, plaintiff further prays that defendant herein take nothing of and from this plaintiff and that plaintiff recover its costs and be given such other and further relief as it may be justly entitled to receive.

Respectfully submitted,

HOWELL COBB,
Howell Cobb,
Attorney for Plaintiff.

First Federal Savings Building,
Beaumont, Texas.

A trial by jury is respectfully requested upon all issues of fact.

HOWELL COBB,
Howell Cobb.

7 IN UNITED STATES DISTRICT COURT

Motion to Dismiss—Filed May 25, 1959

To the Honorable Judge of said Court:

Comes now Emmett Horton, defendant herein, and files this his motion to dismiss and as grounds therefor would show and moves the Court as follows:

I.

To dismiss the action on the ground that the Court lacks jurisdiction because the amount in controversy is less than $10,000 exclusive of interest and costs which is conclusively shown by the award of the Industrial Accident Board (exhibit B) in that their award was $1,050.00 from which the plaintiff herein has appealed; that the amount of disability claimed by the defendant, as a result of his injury of October 8, 1957, prior to or after the filing of this suit would not be binding on defendant and would certainly not be the controlling amount in determining the amount in controversy for purposes of jurisdiction in this action, but to the contrary this suit is at the present exclusively a suit by plaintiff herein to set aside an award of the Industrial Accident Board, which award is $1,050.00 and the only amount in controversy at the present time, and which is considerably less than the $10,000.00 exclusive of interest and costs necessary to give this Honorable Court jurisdiction which it does not have since the amount in controversy is insufficient to give such jurisdiction.

8 II.

To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds that by the Federal Rules of Civil Procedure your defendant is given a period of 20 days after service to file a responsive pleading to plaintiff's original complaint but that by Exhibit A hereto annexed it clearly appears that the date of the service of summons which was served upon the defendant does not appear on said summons so that the defendant nor his attorney are apprised thereby of the exact date of the service of said summons and the defendant is therefore not informed and cannot calculate or deduct from the summons

the exact date in which to serve upon the plaintiff a reply to plaintiff's Original Complaint in order that a judgment by default not be taken.

III.

To dismiss the action on the ground that this Court has no jurisdiction over the subject matter in that this suit is one to set aside an award of the Industrial Accident Board of Texas; that the Workmen's Compensation Insurance Laws of the State of Texas therefore apply hereto; that Article 8207, Section 5, revised Civil Statutes of Texas, 1925 is applicable herein and the pertinent and relevant part reads as follows:

"Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board shall, within twenty (20) days after the rendition of said final ruling and decision by said Board, file with said Board notice that he will not abide by said final ruling and decision. And he shall within twenty (20) days after giving such notice bring suit in the County where the injury occurred to set aside said final ruling and decision, and said Board shall proceed no further toward the adjustment of such claim, other than hereinafter provided."

That the award of the Industrial Accident Board in this case was dated April 30, 1959 (Exhibit B) and a true copy of the summons clearly shows this suit was filed the same day April 30, 1959. That the filing of the suit was prior to the giving notice of dissatisfaction of the Board's award and therefore this Court has no jurisdiction over this action since plaintiff has not complied with the Laws of Texas. In the alternative if it should appear that plaintiff did give their notice of dissatisfaction with the Board's award before filing suit in this Honorable Court it is nevertheless shown by the exhibits attached hereto that the defendant in filing suit to set aside an award of the Industrial Accident Board of Texas on the same day the award was given is in conflict with the above set out statute and that therefore the defendant's action must be dismissed since such non compliance with the Workmen's Compensation Insurance Laws of Texas results in this

Court not having jurisdiction over the subject matter of this lawsuit.

Wherefore, defendant Emmett Horton respectfully prays that the complaint of the plaintiffs herein be in all things dismissed for the reasons above alleged.

JOE H. TONAHILL,

By FLOYD W. ADDINGTON,
Floyd W. Addington,

Attorneys for Defendant.

Jasper, Texas.

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10 A copy of this motion was on this ... day of May, 1959, duly deposited in the United States mail, properly stamped and addressed to Mr. Howell Cobb of Orgain, Bell & Tucker, Attorney at Law, First Federal Savings Building, Beaumont, Texas, the attorneys for the plaintiffs herein.

FLOYD W. ADDINGTON,
Floyd W. Addington.

Exhibit "A" to Motion to Dismiss

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION

LIBERTY MUTUAL INSURANCE COMPANY, *Plaintiff*,

v.

EMMETT HORTON, *Defendant*.

Summons in a Civil Action.

Civil Action File No. 4162

To the above named Defendant: Emmett Horton, Route 2, Box 162, Newton, Texas.

You are hereby summoned and required to serve upon Mr. Howell Cobb of Orgain, Bell & Tucker, plaintiff's attorney, whose address is First Federal Savings Build-

ing, Beaumont, Texas, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES R. COONEY,
Clerk of Court,

(S.) HELEN ROSE BARRY,
Deputy Clerk.

(Seal of Court)

Date: April 30, 1959.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

P. Exh. B-7 to Dep. of [illegible]

Exhibit "B" to Motion to Dismiss

Exhibit "B" to Motion to Dismiss

12

[redacted]
Route 2
Newton, Texas

073-61747 R

INDUSTRIAL ACCIDENT BOARD
WALTON BUILDING
AUSTIN 14, TEXAS

Mr. Joe H. Trenchill, Attorney--15
Trenchill Building
Jasper, Texas

United States Steel Corporation,
American Bridge Division

Liberty Mutual Insurance Company
1250 Travis Street
Houston 2, Texas

Engerrand & Feiner, Austin, Texas Mr. John W. Laird, Attorney

10-8-57

On date of hearing after due notice to all parties, came the above numbered and described claim for compensation to be considered by the Industrial Accident Board, and the Board finds and orders: (Only Findings Orders, etc. X'd in appropriate spaces below apply.)

1. X Finds that on date of injury the employee sustained injury in the course of employment of the employer named above who was a subscriber under the Workmen's Compensation Act, insured with the insurance carrier named above.

2. X Finds that employee's average weekly wage before the injury was X in excess of $58.33

3. X Finds that the compensation rate is $ 38.89

4. X Orders: The carrier to pay employee $ 38.89 per week for 10 consecutive weeks for total disability beginning on 10-9-57 for injuries received

5. Orders: The carrier to pay employee $ _____ per week for _____ consecutive weeks (following payment of compensation, if any, due for total disability) for _____ % permanent loss of

6. X Compensation ordered paid under this award which has accrued from date disability began to date this award is entered, less payments already made, shall be paid in a lump sum.

7. Special Findings and Orders:

X That payments of compensation have matured in the sum of $1,050.00.

That named employee has no loss in wage earning capacity.

13 IN UNITED STATES DISTRICT COURT

Motion to Strike, and Original Answer of Defendant and Defendant's Cross-Complaint—Filed May 25, 1959

Comes now Emmett Horton, defendant herein, and subject to but not waiving his Motion to Dismiss Plaintiff's Original Complaint which is already on file herein, files this his motion to strike and as grounds therefor would show:

1.

Defendant says that the allegations contained in Paragraph 7 of Plaintiff's Original Complaint, to-wit:

"7.

"Plaintiff would further show unto the Court that the said award and order of the Industrial Accident Board of the State of Texas, above described, made, rendered and entered on April 30, 1959 and the claim of the defendant of total and permanent disability is wholly without evidence to support it in law for the reason that, and this plaintiff alleges that any disability which the defendant has is due solely and alone to other diseases, conditions and injuries, or a combination thereof, and in nowise contributed to or caused by the alleged injury in the course and scope of his employment for American Bridge Division, United States Steel Corporation."

14 should be stricken because the same is wholly immaterial, redundant and irrelevant to any of the issues in this cause and such allegation forms no grounds or basis for any cause of action or a part thereof in favor of the plaintiff for the reason that the issue of whether or not any disability which the defendant has is due solely and alone to other diseases, conditions and injuries, or a combination thereof, and in nowise contributed to or caused by the alleged injury in course and scope of his employment for American Bridge Division, United States Steel Corporation, has already been decided in the case of Emmett Horton v. Liberty Mutual Insurance Company, No. 11,986 in the District Court of Orange County, Texas; that the above mentioned case in Orange County involved exactly the same parties as this cause, i.e. Emmett Horton and

Liberty Mutual Insurance Company; that insofar as the issue of the herein defendants disability being due solely to other diseases, conditions and injuries, etc. such issue was answered in favor of defendant in the above referred to Orange County case by the submission of the following special issue and the answer of the jury therein:

"Special Issue No. 5.

"Do you find from a preponderance of the evidence that the plaintiff, Emmett Horton's incapacity, if any, is not due solely to diseases, natural causes, and prior injuries, if any, wholly disassociated from his injury of October 8, 1957, if any?

"Answer: 'It is not due solely to diseases, etc.' or 'It is due solely to diseases, etc.'

"Answer: 'It is not due solely to diseases, etc.'"

That said issue involved the same subject matter as is present in this cause and the presence of this issue in this cause would be immaterial, redundant and irrelevant since said issue has already been settled by judgment and any submission of this issue would thus be barred by res judicata.

Wherefore, the defendant prays that his foregoing motion to strike be in all things granted.

II.

Original Answer.

Subject to Defendant's Motion to Dismiss and Motion to Strike, defendant files this his answer as follows:

First Defense.

1.

The Defendant admits the allegations contained in Paragraph 1 of Plaintiff's Original Complaint.

2.

Defendant admits the allegations contained in Paragraph 2 of Plaintiff's Original Complaint.

3.

Defendant is without sufficient information to either admit or deny the allegations contained in Paragraph

3 of Plaintiff's Original Complaint insofar as the facts alleged therein happening prior to (or "heretofore to-wit") the filing of the plaintiff's suit herein. The defendant does admit the remaining allegations contained in said Paragraph.

4.

Subject to Defendant's Motion to Dismiss on file herein defendant admits the allegations contained in Paragraph 4 of Plaintiff's Original Complaint.

5.

Subject to Defendant's Motion to Dismiss on file herein defendant admits the allegations contained in Paragraph 5 of Plaintiff's Original Complaint.

6.

Defendant denies the allegations contained in Paragraph 6 of Plaintiff's Original Complaint.

7.

Defendant denies the allegations contained in Paragraph 7 of Plaintiff's Original Complaint.

8.

Defendant admits the allegations contained in Paragraph 8 of Plaintiff's Original Complaint.

9.

Defendant denies any allegations contained in the prayer of the complaint herein.

Wherefore, premises considered, defendant prays that plaintiff take nothing by reason of this suit and that this defendant recover all costs of Court incurred herein and for other and further relief, general and special, as defendant may show himself justly entitled to receive.

JOE H. TONAHILL,

By FLOYD W. ADDINGTON,
Floyd W. Addington,
Attorney for Defendant.

Jasper, Texas.

Defendant's Cross-Complaint

Comes now Emmett Horton, hereinafter called cross-plaintiff, and files this his cross-complaint, complaining of Liberty Mutual Insurance Company, hereinafter called cross-defendant, and for cause of action represents unto the Court as follows:

1.

That on or about the 30th day of April, 1959, the Industrial Accident Board rendered an award in the claim of Emmett Horton v. United States Steel Corporation, American Bridge Division, Employer, and Liberty Mutual Insurance Company, Insurance Carrier, Board Number S-46626; that subsequent thereto on May 4, 1959 your cross-plaintiff did on or about May 7, 1959 file suit in the District Court of Orange County to set said award aside; that prior to cross-plaintiff's suit in Orange County the cross-defendant herein filed suit in this Honorable Court to set aside the same award of said Board; that cross-defendant then did and prior to this cross-action file a motion to
18 dismiss the said suit of cross-defendant; therefore cross-plaintiff files this his cross-action subject to his motion to dismiss and without waiving same.

2.

That your cross-plaintiff is a resident citizen of Newton County, Texas; that your cross-defendant is a private corporation incorporated under the laws of the state of Massachusetts and operating in Texas pursuant to a permit from the secretary of State of the State of Texas, with its agent for service being the Commissioner of Insurance, Capitol Building, Austin, Texas, where the cross-defendant may be served with process.

3.

That all conditions precedent to the acquisition of jurisdiction by this Honorable Court have been complied with by your cross-plaintiff by complying with Article 8307, Sections 4-2 and 5, V.A.C.S., and otherwise, both before the Industrial Accident Board and in this Honorable Court, and this appeal from said Board's final award of April 30, 1959.

4.

That your cross-plaintiff, on or about October 8, 1957, while in the course and scope of his employment working for American Bridge Division, United States Steel Corporation in Orange County, Texas, sustained a severe, and permanent, personal, accidental injury; that said employer at all times pertinent hereto was engaged in the general construction work and other operations incidental thereto in Orange County, Texas, and was qualified to and did carry workmen's compensation insurance for its employees who might receive accidental injuries in the course of their employment with such employer, said policy of workmen's compensation insurance being acquired from and issued by your cross-defendant herein, whereby your cross-defendant obligated and bound itself to pay the benefits provided by the Workmen's Compensation Law of the State of Texas to those employees of American Bridge Division, United States Steel Corporation, who might receive accidental injuries while in the course of their employment with such employer; that said policy has been in full force and effect continuously since the day it originally became effective; that at such time your cross-plaintiff was an employee of such concern working for said employer under a written contract of employment as such, or in the alternative, an oral contract, and while so employed on or about October 8, 1957, your cross-plaintiff sustained accidental injuries hereinafter more particularly set forth.

5.

(a) That your cross-plaintiff sustained accidental injury to his body while in the course of his employment for American Bridge Division, United States Steel Corporation in Orange County, Texas, on or about October 8, 1957 on a construction job; that while in the process of welding on a large bridge beam your cross-plaintiff tried to lift one end of said bridge beam; that as he lifted he suddenly experienced an excruciating pain as though something tore loose in his lower back; that said accidental injury has naturally resulted in permanent and total incapacity to the body generally as well as permanent and total incapacity from the date of injury to the muscles, tissues, lig-

aments, sinews, nerves, tendons and bony structure of his neck, spine, lower back, pain down the back of both legs to the mid thigh severe enough to keep him awake which pain is considerably aggravated by any type of strain such as coughing, sneezing, climbing, stooping, or lifting as well as by changes of the weather and said pain is accompanied with frequent headaches, nausea, tenderness in lumbo-sacral region of the back, severe lumbo-sacral sprain or strain, sacro-iliac sprain or strain, ruptured intervertebral disc at L5-S1, compressed fracture in the lower back all of which has produced said total incapacity to your cross-plaintiff's body from the date of injury and for a period of 401 weeks; and said accidental injury, upon occurring, left your plaintiff with pains similar to a burning fire, making him nauseated, resulting in his having to be under the constant care and treatment of physicians to alleviate his suffering to no avail.

(b) Subject to Defendant's Motion to Strike on file herein and without waiving same but still insisting thereon your cross-plaintiff would show that if the evidence should show that he had any pre-existing conditions, diseases or anomalies in the portions of his body aforesaid that said conditions were dormant and in no respect were they disabling and the said injury aggravated and incited such pre-existing conditions, thereby producing your cross-plaintiff's total and permanent disability from the date of his injury.

21

6.

Cross-plaintiff's average wage, regardless of the manner in which it is computed, entitles him to the maximum benefits of workmen's compensation payments in the amount of thirty-five and no/100 ($35.00) Dollars per week for the period of his disability.

7.

That the Industrial Accident Board of Texas, having jurisdiction of your plaintiff's claim for compensation did on April 30, 1959, render its final decision, order and decree in the matter; that said award was contrary to law and inconsistent with your cross-plaintiff's physically incapacitated condition and should, therefore, be set aside and held

for naught; that following said award your plaintiff did, within the statutory time, file with said Industrial Accident Board notice of his dissatisfaction with the award of said Board and of his intention to appeal therefrom; that within the statutory time following the filing of said notice of appeal your cross-plaintiff has filed this cross-action or cross-appeal in this Honorable Court.

8.

(a) That your cross-plaintiff gave due and timely notice to his employer and your defendant of such accidental injury to your cross-plaintiff, said notice of injury being within less than thirty (30) days following the date of such injury reported to cross-plaintiff's employer and to the Industrial Accident Board of Texas.

(b) That following your cross-plaintiff's injuries your cross-plaintiff filed his formal claim for compensation for his injuries with his employer and with your cross-defendant and with the Industrial Accident Board of Texas, within the time and in the manner required by law.

9.

(a) That your cross-plaintiff is entitled to have such compensation paid to him in a lump sum because of the fact that since his injury he has accumulated large indebtednesses both for food for himself and his family and for necessary and proper medical treatment in an attempt to alleviate his condition; that his family is necessarily dependent upon him for support; that whatever compensation awarded your plaintiff by virtue of this suit will be computed at the rate of sixty (60%) per cent of his average weekly wage, but not to exceed thirty-five ($35.00) dollars per week for the period allowed, and same will be discounted at the rate of four (4%) per cent in the event of a lump sum award; that your plaintiff has contracted and agreed to pay his attorney a fee of twenty-five and no/100 per cent (25%) of whatever is recovered herein, subject to the approval of the Court; that the small weekly payments of twenty-six and 25/100 ($26.25) dollars which plaintiff would be due under the law therefore would be inadequate. Therefore, taking into consideration your plaintiff's loss

of earning power, his need for additional treatment for his condition, the amount of his indebtednesses, all of which must be paid by your plaintiff out of his recovery herein, considering that your plaintiff should be placed in a
23 position to invest the money due him in some business that will earn him a livelihood, your plaintiff therefore alleges that unless he is awarded his compensation in a lump sum he will suffer manifest hardship and injustice.

(b) That your plaintiff further alleges that in addition to the above and foregoing allegations that by virtue of his necessitous circumstances that in the event this be a case where compensation is payable weekly at a definite sum and for a definite period that by virtue of your plaintiff's necessitous circumstances and poverty-stricken condition that said weekly amounts of compensation to be paid will therefore be inadequate to meet the necessities of your plaintiff, and that therefore the amount of compensation due and owing should be increased by correspondingly decreasing the number of weeks for which the same is to be paid, allowing defendant discount for present payment at the rate of four (4%) per cent compounded annually as provided by Section 15 (A) of Article 8306, Revised Civil Statutes of Texas, and as amended.

10.

Your cross-plaintiff has employed the law firm of Joe H. Tonahill of Jasper, Texas, as his attorney to represent him in this case, and has contracted and agreed to pay said attorney a reasonable fee for his services, subject to the approval of this Honorable Court, but not to exceed one-fourth (¼) of any recovery herein.

Wherefore, premises considered, cross-plaintiff prays that the cross-defendant be cited to appear and
24 answer this complaint and that upon final hearing hereof, your cross-plaintiff have judgment against your cross-defendant for four hundred one (401) weeks workmen's compensation insurance at the rate of thirty-five and no/100 ($35.00) dollars per week, payable in a lump sum, together with four (4%) per cent interest on all past due installments, for costs of Court, and for such other,

further, and different relief to which your cross-plaintiff may show himself justly entitled, at law and in equity.

JOE H. TONAHILL,
By FLOYD W. ADDINGTON,
Floyd W. Addington,
Attorneys for cross-plaintiff.

Jasper, Texas.

I do hereby certify that a true copy of this instrument constituting motion to strike, original answer of defendant, and cross or counter-claim of defendant has on this 25th day of May, 1959 been duly forwarded by United States mail in an envelope properly addressed to the attorneys for plaintiff, Mr. Howell Cobb, First Federal Savings Building, Beaumont, Texas.

FLOYD W. ADDINGTON,
Floyd W. Addington.

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25 IN UNITED STATES DISTRICT COURT

Plaintiff's Reply to Defendant's Motion to Dismiss—Filed May 29, 1959

Comes Now Liberty Mutual Insurance Company, plaintiff in the above entitled and numbered cause, and files this its reply to motion to dismiss heretofore filed by the defendant.

I.

This is a workmen's compensation case arising out of an accidental injury allegedly sustained by Emmett Horton on October 8, 1957, while in the course of and scope of his employment for the United States Steel Corporation, American Bridge Division, Orange County, Texas. The Industrial Accident Board of Texas made its award on April 30, 1959 and on the same day, Liberty Mutual Insurance Company filed its notice of dissatisfaction and intention to appeal from said award and subsequent to such filing, did on April 30, 1959, file its suit in this Court to set aside the award. The award was for One Thousand Fifty Dollars ($1,050.00) as alleged in its original petition.

II.

Attached hereto as Exhibit A is a certified copy of Employee's Notice of Hearing and Statement filed with the Industrial Accident Board, March 30, 1959, which shows that the employee, Emmett Horton, by and through
26 his attorney, Floyd W. Addington claimed that the nature of injury was Total and Permanent disability. In addition, by his claim, a copy of which is attached hereto as Exhibit B, Emmett Horton states that he had been working eight hours per day, five days per week at a rate of Two and 33/100 Dollars ($2.33) per hour, which sum is in excess of Eighty-five Dollars ($85) per week and sufficient to entitle him to the compensation rate of Thirty-five Dollars ($35) per week. Such claim totals Fourteen Thousand Thirty-five Dollars ($14,035), exclusive of interest and costs. Plaintiff would respectfully show unto the Court that in suits brought by the insurer to set aside the Board's award, the claim made by the employee before the Industrial Accident Board of Texas determines the jurisdictional amount. In this connection, in Booth vs. Texas Employers' Insurance Association, 132 Tex. 237, 123 S.W. 2d, 322 (1938), Judge Smedley speaking for the Commission of Appeals states at page 331:

"When the claim filed with the Board shows the amount claimed, in dollars or cents, or by statement of facts from which an amount can definitely be determined and the award of the Board is less than the amount of that claim, the amount shown by the claim is the amount in controversy, and suit should be filed in the Court having jurisdiction of that amount."

The opinion was adopted by the Supreme Court of Texas.

III.

On May 6, 1959, one week following the filing of the captioned case by plaintiff herein, Emmett Horton,
27 defendant herein, filed a separate suit in the District Court of Orange County, Texas, seeking to recover total permanent disability or the sum of Fourteen Thousand Thirty-five Dollars ($14,035.00) as shown by the attached Exhibit C. This shows that both before the captioned suit

was filed, and after, Emmett Horton has claimed and does claim Liberty Mutual Insurance Company, plaintiff herein, owes him Fourteen Thousand Thirty-five Dollars ($14,035.00) for total permanent disability.

IV.

Defendant states in his motion to dismiss that no notice of dissatisfaction of the award of the Board was filed by the plaintiff herein. Such notice was filed on April 30, 1959. Even if same was not filed, it would be a disputed issue of fact to be determined upon the trial of the case, the contentions of the plaintiff herein by its pleadings raising that issue and defendant should be required to put the question of notice in issue on the trial upon the merits.

V.

Defendant claims that he does not know when the summons and complaint were served upon him. The Marshal's return upon the original summons on file in this Court shows that same was served on May 5, 1959. Defendant certainly knows the date that the Marshal served with him with summons and complaint. His answer date is due twenty (20) days following such service.

28 Wherefore, premises considered, plaintiff respectfully prays that the defendant's motion for dismissal be, in all things overruled and denied.

Respectfully submitted,

HOWELL COBB,
Howell Cobb,
Attorney for Plaintiff.

First Federal Savings Building,
Beaumont, Texas.

On this 28 day of May, 1959, defendant was furnished with a copy of the above and foregoing reply, by mailing a copy of same in the United States Mails to his attorney, Floyd W. Addington, Post Office Box 179, Jasper, Texas.

HOWELL COBB,
Howell Cobb.

8. ☒ **Orders** The carrier is to deduct from this award and to pay to the above named attorney's a fee on the unpaid portion of this award, in the amount of 25% of the amount ordered paid

This is the final award in the above case. Any party who is dissatisfied with this award may appeal to the Superior Court in and for the County of New Castle within 30 days from the date of this award by filing with the Prothonotary of said County a notice in writing stating the cause or causes for which he seeks to have the award reviewed and a copy thereof shall forthwith be served upon the adverse party or parties.

DATED this 30th day of April A.D. 19 99

THE INDUSTRIAL ACCIDENT BOARD

IAB 10-68

12

THE STATE OF TEXAS

INDUSTRIAL ACCIDENT BOARD

AUSTIN

I, Les Moreland, Secretary of the Industrial Accident Board of the State of Texas, DO HEREBY CERTIFY that the attached and foregoing is a full, true and correct copy of EMPLOYEE'S NOTICE OF HEARING AND STATEMENT

S-46626

EMMETT HORTON — EMPLOYEE

VS.

UNITED STATES STEEL CORPORATION, AMERICAN BRIDGE DIVISION — EMPLOYER

and which now appears of record in this Department in the Secretary's File captioned S-46 26

I further certify that said instrument was received and filed in this office on March 30, 1959

Motion to Dismiss

EMPLOYEE'S NOTICE OF HEARING AND STATEMENT

EMPLOYEE. Emmett Morton
Route 2
Newton, Texas

NOTICE MAILED CLAIMANT	DATE OF HEARING	BOARD NUMBER
3-06-39	3-23-39	[illegible]
EMPLOYER NO.	[illegible]	

INDUSTRIAL ACCIDENT BOARD

1 Wm. Joe H. Tomahill, Attorney
Tomahill Building
Jasper, Texas

VS

EMPLOYER United States Steel Corporation, American
Bridge Division
2 P.O. Box 391
Orange, Texas

INSURANCE CARRIER

Liberty Mutual Insurance Company
3 Century Building, 8100 Travis
Houston 8, Texas

cc:

Blanchard & Baker

Date of injury 10-8-37 Total and Permanent Disability

NO ACTION WILL BE TAKEN BY THE BOARD UNTIL CLAIMANT ANSWERS ALL QUESTIONS

In support of my claim, I submit the following information for

A EMPLOYMENT

Are you working now? ☐ Yes ☒ No

4 Name of employer

5 Where did you return to work?

At what wage?

B INJURY

Were you injured in your employer's place of business?
☒ Yes ☐ No

6 On what date were you injured? April 7 1937

On what day did you report your injury? October 8 1937

To whom did you report your injury?
Name Bob Francis
Title Boss

Give name and address of eye witness
Name Co-employees
Address
Name
Address

Have you ever filed any other claim for Workmen's Compensation?

If so give dates of injury

C

If the Insurance Company [illegible] you feel you are entitled to have your claim or [illegible] please submit [illegible]

If employee has died, give names, ages and relationship of [illegible]

MAR 30 1939

TEXAS INDUSTRIAL ACCIDENT BOARD

31 **Exhibit B to Plaintiff's Reply to Defendant's Motion to Dismiss**

Notice of Injury and Claim for Compensation

Texas Workmen's Compensation Law

Administered by Industrial Accident Board—Walton Bldg., Austin, Texas

My full name is (First) Emmett (Middle) (Last) Horton. Social Security No. 458-30-7729.

Age 33.

My employer was (Name) American Bridge Division, United States Steel Corporation, (Address) Orange, Texas.

I was injured in (Mo.) October (Day) 8, (Yr.) 1957 in (City) Orange, (County) Orange, (State) Texas.

Were you hired in Texas? Yes.

If accident occurred outside Texas, on what date were you transferred to state where accident occurred? (Month, Day, Year) .....

I was working 8 hours per day 5 days per week at $2.33 per (Hour-Day-Week-Month) hr.

My average weekly wage was $.....

32 How long had you been working for this employer? 4 months.

Were you paid wages for date of injury? Yes.

I started losing time on (Month) October (Day) 8, (Year) 1957.

Are you now receiving compensation? No.

Have you been paid any compensation? No.

If so, how much per week $..... For how many weeks have you been paid? .....

Have you returned to work? No. If so, on what date? (Mo., Day, Yr.) .....

Describe accident and your injury (In your own words) A co-employee and I were welding on a bridge beam which weighed approximately 1200 pounds. I was working at one end of the beam and my co-employee was working at the other end. They were in a hurry to get it finished and would not wait to get a crane to lift the beam, so we tried to turn it over. When I lifted on the end of it where I was working, something suddenly popped and felt as if it tore loose in my back with severe pain and a hot, burning sensation in my back. The injury was to my back and spine,

and the pain extended down into both my legs, I suffer severe headaches, and the severe pain from my back and spine causes nauseation.

33 Was any part of your body amputated? .....

If so, name member and give point of amputation.

.....

Were you sent to a doctor or hospital by your employer or his insurance company? Yes.

Please give as much of the following information as you have:

Name and address of doctor: Dr. Allen and Dr. James, Orange, Texas; and Dr. Love at the .....

Name and address of hospital: Newton County Hospital, Newton, Texas.

I was hospitalized 3 times.

Name of employers insurance company: Liberty Mutual Insurance Company.

My average weekly wage was $.....

Name and address of nearest relatives: Marcell Horton (wife) Rt. 2, Newton, Texas.

I hereby give notice of injury and file claim for compensation due me under Workmen's Compensation Law of Texas.

I request that the Industrial Accident Board (Check one)

☐ Not take further action until requested by me.

34 ☒ Act on my claim as soon as possible.

Date Signed December 10, 1957.

Signature of injured employee:

EMMETT HORTON.

Street Address:

Route 2,

(City and State) Newton, Texas.

Witness to Signature:

.....

Exhibit C to Plaintiff's Reply to Defendant's Motion to Dismiss

Joe H. Tonahill
Lawyer
Jasper, Texas

John H. Beale
Associate

Phone 14

IN THE DISTRICT COURT OF ORANGE COUNTY, STATE OF TEXAS

No. 12,365

EMMETT HORTON,

VS.

LIBERTY MUTUAL INSURANCE COMPANY.

Plaintiff's Original Petition

To the Honorable Judge of said Court:

Comes now Emmett Horton, plaintiff in the above entitled and numbered cause, complaining of Liberty Mutual
35 Insurance Company, incorporated under the laws of Massachusetts, hereinafter for brevity styled defendant, and for cause of action respecfully represents unto the Court as follows.

I.

That your plaintiff is a resident citizen of Newton County, Texas; that your defendant is a Massachusetts corporation operating pursuant to the laws and permit of the State of Texas with a permit at all times pertinent hereto to do business in Orange County, Texas; that service of process may be had upon the defendant by serving the Commissioner of Insurance, State Capitol Building, its duly authorized agent, Austin, Texas.

II.

That all conditions precedent to the acquisition of jurisdiction by this Honorable Court have been fully complied with by your plaintiff by complying with Article 8307, Sections 4-a and 5, V.A.C.S., and otherwise, both

before the Industrial Accident Board and in this Honorable Court and this appeal from the Industrial Accident Board's final award of April 30, 1959.

III.

That on or about October 8, 1957, your plaintiff was an employee of United States Steel Corporation, American Bridge Division in Orange County, Texas, which employer at all times pertinent had been issued a Texas workmen's compensation insurance policy by defendant which
36 covered your plaintiff against industrial accidental injuries and which policy was in full force and effect; that on said aforesaid date your plaintiff sustained accidental injury to his body while in the course of his employment for said employer in Orange County, Texas, which accidental injury has naturally resulted in total permanent incapacity to the body generally from the date thereof, making your defendant liable to your plaintiff in the lump sum and amount of Fourteen Thousand, Thirty-Five ($14,035) Dollars for which amount your plaintiff comes now and sues together with legal interest thereon.

IV.

Plaintiff's average wage, regardless of the manner in which it is computed, entitles him to the maximum benefits of workmen's compensation payments in the amount of thirty-five and no/100 ($35.00) dollars per week for the period of his disability.

V.

Your plaintiff has agreed to pay his attorney, Joe H. Tonahill, of Jasper, Texas the maximum per cent of any recovery herein, subject to the approval of the Court.

VI.

Your plaintiff reserves the right to amend this petition and enlarge upon the facts pertinent to his injury and claim for compensation benefits.

Wherefore, premises considered, your plaintiff prays that defendant be cited to appear and answer herein,
37 that he have judgment against defendant in the amount of Fourteen Thousand, Thirty-five ($14,035.00) Dollars workmen's compensation benefits, together with legal interest and costs, and for such other, further, and different relief to which he may show himself justly entitled at law and in equity.

JOE H. TONAHILL,
By FLOYD W. ADDINGTON,
Attorneys for Plaintiff.

P. O. Box 179,
Jasper, Texas.

The State of Texas

To: Liberty Mutual Insurance Company, upon whom service of process may be had by serving the Commissioner of Insurance, State Capitol Building, Austin, Texas, Defendant, Greeting:

You Are Hereby Commanded to appear before the Honorable District Court, 128th Judicial District of Orange, County, Texas, at the Court House of said county in Orange, Texas, by filing a written answer, at or before 10 o'clock a.m. of the Monday next after the expiration of twenty days after the date of service of this citation, to Plaintiff's Petition filed in said Court on the 6th day of May, A. D. 1959, numbered 12,365 on the docket of said Court, and styled.

38 EMMETT HORTON, *Plaintiff*,

VS.

LIBERTY MUTUAL INSURANCE COMPANY, *Defendant.*

The nature of Plaintiff' demand is set out and shown by a true and correct copy of Plaintiff's Petition, accompanying this citation, and made a part hereof.

If this citation is not served within ninety days after the date of its issuance, it shall be returned unserved.

The officer executing this writ shall promptly serve the same according to requirements of law, and the mandates hereof, and make due return as the law directs.

Issued and given under my hand and the seal of said Court at Orange, Texas, this the 6th day of May, A. D. 1959.

Attest:

MRS. T. M. DODD,
Clerk, District Court, Orange County, Texas,

By ETHEL BURTON,
Deputy.

(Seal)

* * * * * *

File No. 12,365. Citation for Personal Service (District Court). Emmett Horton vs. Liberty Mutual Insurance Company. In District Court of 128th Judicial District, Orange County Texas. Issued This 6th day of May, 1959. Mrs. T. M. Dodd, Clerk, District Court By Ethel
39 Burton, Deputy. Filed this ... day of ... 19.. At ....o'clock ..M.

* * * * * *

Delivered this 8 day of May, 1959. T. O. Lang, Sheriff of Travis County, Texas, J. C. Hester, Deputy.

* * * * * *

I hereby certify this notice was served on me May 8, 1959, by the Sheriff of Travis County, Texas, Wm. A. Harrison, Commissioner of Insurance, State of Texas.

The State of Texas.
Industrial Accident Board.
Austin.

I, Les Moreland, Secretary of the Industrial Accident Board of the State of Texas, Do Hereby Certify that the attached and foregoing are full, true and correct photostatic copies of certain instruments which appear of record in this Department in the claim numbered and styled S-46626.

EMMETT HORTON, *Employee*,

vs.

UNITED STATES STEEL CORPORATION, AMERICAN BRIDGE DIVISION, *Employer*.

I further certify that certain of said instruments bear the "receiving stamp" of the Industrial Accident Board and that each of said instruments bearing said
40 stamp was received and filed in this office on the date shown by said indorsement thereon.

I further certify that I have the custody of the records of the Industrial Accident Board of the State of Texas.

In Testimony Whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of the Industrial Accident Board at its offices in the Walton Building in the City of Austin, Texas, on this 25th day of May, A. D. 1959.

LES MORELAND,
Secretary.

April 30, 1959.

1 only

Board No. S-46626
Claim No. C75 61747 R
Emmett Horton vs
United States Steel Corporation

Industrial Accident Board,
Walton Building,
Austin, Texas.

Gentlemen:

This is to notify you that the Liberty Mutual Insurance Company is not willing to, and does not consent to abide by the final ruling, decision and award of the Industrial Accident Board, under date of April 30, 1959, in favor of Emmett Horton, and his attorney of record, Mr. Joe H. Tomahill of Jasper, Texas, in case of Emmett Horton, employee against United States Steel Corporation, American Bridge Division, employer, and the Liberty Mutual Insurance Company, insurer, and will within twenty days from date of service file suit in a court of competent jurisdiction for the purpose of setting aside said final ruling, decision and award.

This Notice is given as is provided in Section 5, Part II of Article 8307.

RECEIVED
APR 30 1959
TEXAS INDUSTRIAL ACCIDENT BOARD

Respectully submitted,

LIBERTY MUTUAL INSURANCE CO.,

By _____
For the Company

Personal service is herety acknowledged this the 30th day of April , A. D., 1959.

INDUSTRIAL ACCIDENT BOARD

By Lula Martin

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of the Industrial Accident Board at its offices in the Walton Building in the City of Austin, Texas, on this 4th. day of May, A.D. 1959

Name Boss

Give name and address of eye witnesses

Name Co-employers

Address

Name

Address

Have you ever filed any other claim for Workmen's Compensation?

If so give dates of injury

4

RECEIVED
MAR 29 1929
INDUSTRIAL
ACCIDENT BOARD

Witness Signature

Dated March 28, 1929

ONE COPY OF THIS STATEMENT MUST BE IN THE HANDS OF THE INDUSTRIAL ACCIDENT BOARD BY DATE OF HEARING

3

42 IN THE UNITED STATES DISTRICT COURT

**Plaintiff's Reply to Defendant's Motion to Strike—
Filed Jun. 4, 1959**

Comes Now Liberty Mutual Insurance Company, plaintiff herein and files this its reply to defendant's motion to strike certain matters in its pleadings and would show the Court the following:

1.

In Cause No. 11,986 in the District Court of Orange County, Texas, suit was brought by Emmett Horton against Liberty Mutual Insurance Company to set aside the compromise settlement agreement. In that suit Horton alleged only disability for 82 weeks. The main issue decided in that case was whether the compromise settlement agreement entered into by and between Horton and Liberty Mutual should be set aside on the grounds of fraud. It was so set aside and the issues as to Horton's disability being due solely to other diseases, conditions, was not properly in the suit because even a favorable answer would have had no effect on the main question in the case, that is the release and compromise settlement agreement. Further as to any disability above that alleged in Cause No. 11,986 in Orange County District Court, Liberty Mutual Insurance Company should not be barred from pleading that Horton's disability was due to other conditions, since he in no way placed that at issue in such other suit

43 Wherefore, plaintiff prays that defendant's motion to strike be in all things overruled, and for such other relief as it may be justly entitled to receive.

HOWELL COBB,
Howell Cobb,
Attorney for Plaintiff.

First Federal Savings Building,
Beaumont, Texas.

On this 3 day of June A. D. 1959 a copy of the above and foregoing reply was furnished defendant's attorney, Mr. Floyd W. Addington by mailing a copy of same to his address, Post Office Box 179, Jasper, Texas.

HOWELL COBB,
Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

Memorandum Decision—June 19, 1959

Plaintiff, a Massachusetts corporation, instituted this suit on April 30, 1959, against the Defendant, a resident and citizen of Newton County, Texas, seeking to set aside an award of the Industrial Accident Board of the State of Texas made by that Board on April 30, 1959, ordering the Plaintiff to pay to Defendant Workmen's Compensation benefits under the Workmen's Compensation law of the State of Texas for 30 weeks at the rate of $35.00 per week
44 because of incapacity to labor that the Defendant suffered as a result of an accidental personal injury he sustained on or about October 8, 1957, while in the course of his employment with his employer, American Bridge Division, United States Steel Corporation. In its original complaint Plaintiff alleges, in effect, that the Defendant in his claim before the Industrial Accident Board of the State of Texas alleged that as a result of his said injury of October 8, 1957, he suffered total and permanent incapacity to labor and as a result thereof was entitled to be paid by the Plaintiff compensation benefits at the rate of $35.00 per week for 401 weeks or the aggregate sum of $14,035.00. Based on such last mentioned allegations and the diversity of citizenship that exists between the Plaintiff and the Defendant, Defendant asserts jurisdiction of this Court of this cause under the provisions of 28 U.S.C.A. 1332 as amended by the Eighty-fifth Congress.

On May 25, 1959, the Defendant filed a motion to dismiss this cause for want of jurisdiction alleging among other grounds that the amount in controversy was less than $10,000.00 because the aggregate amount of the award of the Industrial Accident Board of the State of Texas which Plaintiff by this suit is seeking to set aside was $1,050.00. On the same date, alleging that same was being filed subject to its said motion to dismiss, the Defendant filed its answer to Plaintiff's complaint and a cross-complaint against the Plaintiff in which cross-complaint he sought to recover from the Plaintiff Workmen's Compensation benefits because of incapacity to labor he claims he suffered as a result of his October 8, 1957, injury, above mentioned for 401 weeks at the rate of $35.00 per week, or for the

aggregate sum of $14,035.00. The facts as shown by
45 the record in this case, including Plaintiff's motion to dismiss and the attachments thereto and Plaintiff's reply to Defendant's motion to dismiss and the attachments thereto, are as follows: The Defendant in his claim before the Industrial Accident Board claimed in effect, that he was totally and permanently disabled as a result of his injury on October 8, 1957, and that because thereof he was entitled to be paid Workmen's Compensation benefits by the Plaintiff for 401 weeks at the rate of $35.00 per week. The award of the Industrial Accident Board, which Plaintiff seeks to set aside in this action, awarded Plaintiff Workmen's Compensation benefits only for the aggregate sum of $1,050.00. On April 30, 1959, the Plaintiff duly gave notice to the Industrial Accident Board of the State of Texas of its intention to appeal from said award of the Industrial Accident Board. On May 6, 1959, Defendant filed a suit against the Plaintiff in the District Court of Orange County, Texas, seeking to recover therein Workmen's Compensation benefits at the rate of $35.00 per week for 401 weeks for the incapacity to labor he claims he has suffered and will suffer as a result of his October 8, 1957, injury.

Although the Plaintiff admits that the award of the Industrial Accident Board which it seeks to set aside in this cause was only for the aggregate sum of $1,050.00, it contends that the amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs since the Defendant claimed before the Industrial Accident Board of the State of Texas that he was entitled to Workmen's Compensation benefits in the aggregate amount of $14,035.00. In so contending, the Plaintiff relies on Booth v. Texas Employers' Ins. Ass'n., 123 S.W. 2d 322.

46 The identical question presented here was before Judge Estes in the United States District Court for the Northern District of Texas in National Surety Corp. v. Chamberlain, 171 F. Supp. 591. Judge Estes sets forth his reasons in an excellent opinion, concluding that in a situation such as is presented in the instant case the Federal Courts are without jurisdiction because the requisite jurisdictional amount is not involved. Being of the opinion that Judge Estes properly construed the law, in that case, I have concluded that this Court does not have jurisdiction of this

cause because the amount in controversy does not exceed the sum of $10,000.00, exclusive of interest and costs.

Defendant's motion to dismiss for want of jurisdiction will be sustained. Since Defendant's cross-claim was filed subject to his motion to dismiss Defendart's cross-claim will likewise be dismissed.

Dated this 19th day of June, 1959.

(S.) JOE W. SHEEHY,
United States District Judge.

IN UNITED STATES DISTRICT COURT

Order of Dismissal for Want of Jurisdiction—July 20, 1959

Be It Remembered on this the 20th day of July, A. D. 1959, came on to be considered the motion of the defendant, Emmett Horton, to dismiss the above entitled and numbered cause on the ground that the jurisdictional amount
47 of this Court was not involved, and the Court being of the opinion that the jurisdictional amount in this cause is the sum of $1,050.00, the award of the Industrial Accident Board made and entered April 30, 1939 is the amount in controversy, and further being of the opinion that the defendant's motion to dismiss for want of jurisdiction should be in all things granted and sustained;

It is, therefore, Ordered, Adjudged and Decreed that the above entitled and numbered cause be, and the same is hereby, dismissed for want of jurisdiction of this Court, to which action of the Court the plaintiff in open Court excepted and objected and gave its notice of appeal to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Rendered and Entered this the 20th day of July, A.D. 1959.

(S.) JOE W. SHEEHY,
Joe W. Sheehy,
Judge Presiding.

Approved as to Form:

(S.) FLOYD W. ADDINGTON,
Floyd W. Addington,
Attorney for Defendant.

(S.) HOWELL COBB,
Attorney for Plaintiff.

48 IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed Jul. 30, 1959

In the United States District Court in and for the Eastern District of Texas, Beaumont Division.

Civil Action No. 4162

LIBERTY MUTUAL INSURANCE COMPANY,

VS.

EMMETT HORTON.

Comes Now the plaintiff, Liberty Mutual Insurance Company, and after the Motion for Dismissal had been granted by the Court, and in due and timely fashion files this its Notice of Appeal to the United States Court of Appeals for the Fifth Circuit sitting at New Orleans, Louisiana.

Dated this 30 day of July, A. D. 1959.

HOWELL COBB,
Howell Cobb,

ORGAIN, BELL & TUCKER,
Attorney for Plaintiff, Liberty Mutual Insurance Company.

First Federal Savings Building,
Beaumont, Texas.

---

49 Bond on appeal for $250.00 and filed July 30, 1959
(Omitted in printing)

---

50 **Designation of Record—Filed July 30, 1959**

(Omitted in printing)

---

52 **Clerk's Certificate**

(Omitted in printing)

54 IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17958

LIBERTY MUTUAL INSURANCE COMPANY, *Appellant*,

versus

EMMETT HORTON, *Appellee*.

Appeal from the United States District Court for the Eastern District of Texas.

Opinion—February 22, 1960

Before RIVES, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: This is an appeal from a judgment dismissing for want of jurisdiction a workmen's compensation suit filed by appellant, Liberty Mutual Insurance Company, in the United States District Court for the Eastern District of Texas. It was brought to set aside an award of the Industrial Accident Board of Texas, and to be relieved from the em-
55 ployee's claim against it that he became totally and permanently disabled and entitled to an award, under the Texas Compensation Act, of $14,635.00, as a result of an accidental injury incurred while in the course of his employment on a job where Liberty Mutual Insurance Company was the compensation insurer.

Jurisdiction was founded upon diversity of citizenship: in that appellant is a Massachusetts corporation and Emmett Horton is a resident citizen of Texas; and upon the good faith allegation that more than $10,000.00 was in controversy: in that Horton allegedly was injured on October 8, 1957, while employed by American Bridge Division of United States Steel Corporation in Orange County, Texas; that Liberty Mutual Insurance Company, appellant, was the workmen's compensation carrier for the employer; that Horton filed his statement with the

Industrial Accident Board claiming total and permanent disability at a rate of $35.00 per week for 401 weeks, or a total of $14,035.00; and that on April 30, 1959, the Board entered its award allowing Emmett Horton $35.00 a week for 30 weeks, a total of $1050.00.

Horton answered, and, in addition, filed a cross-action for total and permanent disability, 401 weeks at $35.00 a week, a total of $14,035.00, alleging diversity of citizenship and an amount in excess of $10,000 in controversy.

On motion by Horton to dismiss the suit for want of jurisdiction, the district judge turned his face away from the controlling decision of the Texas Supreme Court
56 and from the many decisions of this court, declaring that Federal Court Jurisdiction in Texas Workmen's Compensation suits is a special jurisdiction and, in exercising it, the court is bound by, and must strictly follow, the construction placed on the statutes by the state courts. Advancing as his sole reason for doing so his reliance on *National Surety Co.* v. *Chamberlain*, 171 Fed. Supp. 591, an opinion of the District Court for the Northern District of Texas, he declined to follow the settled law to the contrary, and, holding that there was no jurisdiction in the federal court, since the order of the board was for less than $10,000.00, the amount in controversy was less than the requisite jurisdiction, he dismissed both the original action and the counter claim.

Appealing from this order, the insurer is here insisting that, for the reason set out in the margin,[1] the district

[1] (a) In a suit founded upon diversity of citizenship filed by the insurer directly in Federal Court under the Texas Workmen's Compensation Law, the amount in controversy is ascertained by the amount claimed by the employee before the Industrial Accident Board, since the right the insurer seeks to protect is the right to be free from the claimed liability. Cf. Booth v. Texas Employers, 123 SW(2) 322 (1938); and General Acc. v. Mostert, 131 F(2) 596 (1942).

(b) Upon the record in the present case, it cannot be said that appellant's suit was not brought in good faith, nor that as a legal certainty the amount of claimed liability from which appellant seeks relief will not, under Texas law, be successfully asserted against it.

(c) The court erred in dismissing this action for an additional reason. By filing his cross-complaint appellee affirmatively requested the court to decide the controversy alleged to exist in appellant's complaint and to grant him the sum of $14,035.00 as compensation which is the precise sum appellant alleged to be in controversy.

court erred in holding that the amount in controversy did not exceed $10,000.00, and in dismissing the cause.
57 For the reasons following and upon the authorities hereafter set down, we agree that this is so.

Under Article 8307, Section 5, Vernon's Texas Statutes, either party may bring a de novo action to set aside an award. In the authoritative case of *Booth* v. *Texas Employers Insurance Association*, 123 SW(2) 322 (Tex. Com. App. opinion adopted by the Supreme Court, 1938), a thorough analysis of the procedures of the Workmen's Compensation Law was made. At page 328 the court says:

> ". . . The suit to set aside an award of the board is in fact a suit, not an appeal. It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board. Section 5, as amended, of Article 8307, prohibits the board from proceeding further toward the adjudication of the claim after the filing of the suit. The trial in court is de novo, wholly without reference to what may have been decided by the board. It is true that as conditions precedent to the filing of suit the insurer or the employer must have been notified of the injury, claim must have been filed with the board, and the board must have made a final ruling and decision (Section 4a, Article 8307), but these requirements do not negative the fact that a suit is filed and tried, not merely an appeal taken."

Thus, as interpreted by the Supreme Court of Texas, proceedings before the Industrial Accident Board are viewed as mere procedural preliminaries to suit, the so-called "appeal" being in actuality an original action. Once
58 the suit is brought, the Board's findings and award are totally abrogated.

Yet the claim before the Board does have the binding substantive effect of fixing the extent of the insurer's liability as claimed by the employee. In 123 SW(2) 322, at page 329, the court declares:

> "It has repeatedly been held that, although one claim cannot be filed with the board and another and different claim asserted in court yet when the injury suffered is of that class of injuries, sometimes called

general injuries, for which the compensation is based upon incapacity to work, and not of that class of injuries usually called specific injuries, for which the amount of compensation is fixed by the statute, a general description of the injury is sufficient in the claim made before the board, and that in the suit filed to set aside the award of the board the claim may be enlarged to include all injuries proximately resulting from the accident."

After thus holding, quite logically, that regardless of who files the suit attacking the Board's award, the true controversy concerns the right of the employee to compensation, and, the amount of his claim before the Board fixing the extent of the insurer's claimed liability is the sole indication of the amount actually in controversy, the court, at page 331 sets out the rule governing jurisdictional amount regardless of who files the suit. That rule is:

"When the claim filed with the board shows the amount claimed, in dollars and cents or by statement of facts from which the amount can definitely be
59 determined and the award of the board is less in amount than that of the claim, the amount shown by the claim is the amount in controversy and the suit should be filed in the court having jurisdiction of that amount."

Appellant alleged in its petition that appellee had made a claim before the Board for total and permanent disability and for compensation in the aggregate amount of $14,035.00; while appellee has filed in this cause a cross-claim asking for the same relief and for the same $14,035.00, all growing out of the same controversy.

In 1936, in a Texas Workmen's Compensation suit, *Great American Indemnity* v. *Dominguez*, 84 F(2) 179, an opinion uniformly and many times approved and followed,[2] this court, rejecting a district court ruling, in effect that federal courts, in determining their jurisdiction, are not bound to follow state court rulings, declared:

[2] Digby v. U.S.F. & G., 239 F(2) 569; Pappas vs. Royal Indemnity, 351 F(2) 439.

"We think this ruling out of accord with the decisions of the Texas Courts which we are bound to follow. These are that the jurisdiction of a court to hear a suit to set aside a final ruling and decision of the Industrial Accident Board is absolutely dependent upon plaintiff's pleading and proving exact and literal compliance with the essential statutory steps."

In 1937, this court in *Heard* v. *Texas Corporation*, 87 F(2) 30, at page 32 said:

"It is settled law that the remedy afforded by the Texas Workmen's Compensation Statutes is exclu-
60 sive; that the jurisdiction of the district court is a special jurisdiction, and that in a workmen's compensation case every step provided in the statute must be taken as there presented."

Again, in 1942, after the Supreme Court of Texas had in 1938, in the Booth case, dealt specifically, completely, and authoritatively with the matter of trial court jurisdiction of suits to set aside orders of the Board, this court, in *General Accident* v. *Mostert*, 131 F(2) 596, declared and followed the rule for determining jurisdiction laid down by the Supreme Court of Texas in the Booth case.

In the light of these decisions, we are in no doubt that the district judge in this case was without warrant in determining jurisdiction by any other rule than that there laid down. In addition, we think it clear that, if this court had not already ruled on the matter and it was an open one here, the district court would have erred in denying jurisdiction under the settled federal rule for determining it, as laid down by the Supreme Court in *St. Paul Merc. Indemn. Co.* v. *Red Cab Co.*, 303 U.S. 283 and *Bell* v. *Preferred Life Soc.*, 320 U.S. 238, and by this court in *Colonial Oil Co.* v. *Vining*, 237 F(2) 913, and the many cases from this court cited in it to the same effect. This rule, as restated in the Vining case, is "that the good faith allegations of the complaint, that the matter in controversy exceeds the sum of $3000 [$10,000], exclusive of interest and
61 costs, is sufficient to confer jurisdiction unless it appears elsewhere in the complaint or by proof aliunde that less than that amount is involved."

A further and additional reason why jurisdiction should not have been refused in this case is that it is the long established rule that where, as here, the jurisdictional amount is in question, and a counterclaim is brought in an amount which, in itself or added to the amount claimed in the complaint, adds up to an amount in excess of the minimum jurisdictional amount, jurisdiction is established whatever may be the conclusion viewed from the plaintiff's complaint alone. *Home Life Ins. Co.* v. *Sipp*, 11 F(2) 474 (3 Cir.) (1926); *Roberts Min. & Mill Co.* v. *Schrader*, 95 F(2) 522 (9 Cir. 1938); *Henderson* v. *Maryland*, (5 Cir.) 62 F(2) 107. See also *Isenberg* v. *Biddle*; 125 F(2) 741 (D.C. Cir. 1941); *Switzer Bros.* v. *Chicago Cardboard Co.*, 252 F(2) 407 (7 Cir. 1958). This principle is especially applicable in a compensation suit under the Texas Workmen's Compensation Act, which in terms and as pointed out in the Booth case, recognizes the compensation claimant as the real plaintiff in, and master of the suit[3] when, as he has done here, he seeks affirmative relief by cross-action and demands process thereon. Cf. Barron & Holtzoff, "Federal Practice and Procedure", Rules Ed. Vol. 1, 1958 Pocket Part, Sec. 370, Rule 12:

62 "An involuntary plaintiff who filed an answer seeking affirmative relief against plaintiffs by way of counterclaim submitted to the jurisdiction of the court and waived objection to venue. Hook & Ackerman v. Hirsh, 98 F. Supp. 477."

Cf. *Switzer Bros.* v. *Chicago Cardboard Co.*, *supra*, at p. 411.

The other grounds put forward, in the Chamberlain case and, therefore, by his approval of it by the district judge below, mere make weights whose very statement begs the question proposed to be argued, may be as confidently and summarily disposed of. These are: (1) that federal courts, in order to give full effect to the present amendments withdrawing federal jurisdiction for certain re-

[3] 45 Tex. Jur., "Workmen's Compensation", Chapt. 14, "Appeals to the Courts", Sec. 274 et seq. p. 759, and Chapt. 15, "Trial De Novo", Sec. 285 et seq., fully explains the situation in line with these views. Sec. 295 points out that the statute provides that in all suits to set aside an award the burden of proof shall be upon the party claiming compensation.

moval cases, must in effect rewrite the statute to make it read on original compensation suits authorized by the Texas statute and the uniform course of federal decisions in this state; and (2) that the Texas statutory compensation suit must be analogized to efforts to have state condemnation proceedings reviewed in the federal courts.

Of the first ground, it is sufficient to say that, while federal courts have power to construe and apply the laws of Congress, they have no power to rewrite, expand, or contract them. Therefore, the categorical statement at page 596 of the Chamberlain opinion, "It is certain that congress did not intend the federal court to have jurisdiction in such a case as this", as is pointed out in an excellent 63 Texas Law Review Note, Vol. 38 No. 1, 117,[4] *flies in the face of the act itself limiting its reach to removal cases and is, therefore, mere fiating. In short, Congress has withdrawn removal cases concerning Workmen's Compensation laws from Federal Jurisdiction. Congress was aware that certain Workmen's Compensation suits are filed in Federal Courts, under State laws, as original actions. If the intent of Congress had been to withdraw these*

[4] "As to the congressional intent basis for the decision in the principal case, it would appear that such intent, however clearly expressed, should not have the efficacy of law to extend or to amend the scope of a statute involving jurisdiction. Here Congress withdrew federal jurisdiction for certain removal cases, not original actions. Since jurisdiction of the lower federal courts is based solely upon Congressional grant (See McCormick and Chadbourn, Cases on Federal Courts, Ch. 1 (1957).) federal courts should 'scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' (Healy v. Ratta, 292 U.S. 263, 270 (1934)). *Furthermore, an attempt to apply Congressional intent as law raised additional difficulties in the administration of a federal court system. The policy of reducing litigation in the federal courts is a vague criterion for refusing to accept jurisdiction. Also the policy of allowing the workman his choice of forums is not effected by refusing to accept jurisdiction of original actions where an appeal has been filed in the state court, nor is it defeated by accepting jurisdiction of the original actions, since state courts retain jurisdiction regardless of action in the federal courts.*

"The practical effect of the principal case is that in a controversy meeting federal jurisdiction requirements arising under a state workmen's compensation statute neither party is assured recourse to the federal court when a state administrative agency has obtained jurisdiction since his opponent may defeat federal jurisdiction by filing in the state court. To refuse to accept jurisdiction under these circumstances is to hold that workmen's compensation cases are an exception to the rule that when there is an in personam action involving a money judgment, federal jurisdiction is concurrent with state jurisdiction." (emphasis supplied)

cases also from federal jurisdiction, it would have said so by the simple insertion of the words "or filed in the
64 *United States District Courts". It is highly improper to extend such exclusion without congressional act.*

The second ground is even less substantial. The result of wishful thinking and whistling in the dark, it presents nothing more than shadow boxing, the putting up of a straw man to knock him down. The thing in question here is a thing not of shadow but of substance. It is a right, until Congress takes it away, to bring and maintain in the federal courts on the ground of diversity jurisdiction, suits which, over the long years that have gone since the Texas Workmen's Compensation Act was passed and such suits provided for, have been filed and maintained uniformly in both state and federal courts of Texas,[5] not as a matter of the grace of the courts but of the right of the litigant, a right declared and established long ago by the great Chief Justice, in *Cohens v. Virginia*, 19 U.S. 264, at p. 404, in these memorable words:

> "It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp
65 that which is not given. The one or the other would be treason to the constitution."

Such suits will continue to be brought and maintained in the same way until Congress, not the courts, withdraws the right.

The judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings.

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[5] In 45 Tex. Jur., p. 730, the text says: "The compensation law does not in terms restrict a review of the decisions of the board to the state courts. Resort is frequently had to the federal courts." Cf. 5 Texas Law Review, p. 448.

66 IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17958

LIBERTY MUTUAL INSURANCE COMPANY,

versus

EMMETT HORTON.

Judgment—Feb. 22, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered and adjudged that the appellee, Emmett Horton be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

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67 Petition for Rehearing covering 6 pages filed March 14, 1960 omitted from this print.

It was denied, and nothing more by order April 8, 1960.

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77 IN THE UNITED STATES COURT OF APPEALS

Order Denying Rehearing—April 8, 1960

It Is Ordered that the petition for rehearing in the above entitled and numbered cause be, and it is hereby Denied.

78 **Clerk's Certificate to Foregoing Transcript**

(Omitted in printing)

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79 SUPREME COURT OF THE UNITED STATES

No. 70 Misc.

October Term, 1960

EMMETT HORTON, *Petitioner*,

vs.

LIBERTY MUTUAL INSURANCE COMPANY

Order Granting Motion for Leave to Proceed In Forma Pauperis and Granting Petition for Writ of Certiorari—October 10, 1960

ON PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 478.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 10, 1960

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PETITION NOT PRINTED

FILE COPY

No. 478

Office Supreme Court, U.S.
FILED
JUL 14 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

NO. [redacted] 1478
(Miscellaneous Docket)

EMMETT HORTON, *Petitioner*

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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